Supreme Court, U.S.
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NO. 96-974

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OTIS HENRY,

Petitioner

v.

THE CITY OF SHERMAN,

Respondent

On Petition For A Writ Of Certiorari
To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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January 15, 1997

QUESTION PRESENTED (Restated)

Whether any constitutional right to privacy exists that bars a chief of police from temporarily passing over for promotion to sergeant, a police officer who is committing adultery with another department employee who is the spouse of a fellow police officer, and there is evidence that the affair is causing disruption in the department?

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On Petition For A Writ Of Certiorari
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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF THE UNITED STATES:

Respondent requests that the Court deny the petition for a writ of certiorari seeking review of an opinion of the Texas Supreme Court. The Opinion of the Texas Supreme Court is reported at 928 S.W.2d 464 (Tex. 1996). The transcript, which consists of pleadings, filings, orders, and the judgment will be referred to as "Tr. ____." Petitioner will be referred to as "Henry" and Respondent will be referred to as "the City."

OPINIONS BELOW

Petitioner's application adequately describes the opinions below. However, it should be noted that the "memorandum opinion" of the 336th District Court is not authorized by the Texas Rules of Procedure. Texas trial courts may not file findings of fact or conclusions of law in a summary judgment case as they may after a trial on the merits. Tex. R. Civ. P.; *Starnes v. Halloway*, 779 S.W.2d 86 (Tex. Civ. App. - Dallas 1989 writ denied).

STATEMENT OF JURISDICTION

Petitioner's application accurately sets out the basis for jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

There is no federal Constitutional provision which mentions privacy, especially in the context of adultery with a co-worker married to another co-worker. Petitioner seeks to dramatically expand the penumbra described in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).

STATEMENT OF THE CASE

Petitioner's statement of facts is not complete. As set out below in more detail, Petitioner did not withdraw from his adulterous relationship until after the passover for promotion and the affair did not come to light through a complaint by the husband. A more complete description of the facts, which are important in this case, follows.

The Eligibility List Is Posted

The City posted a civil service eligibility list after giving an examination for the position of Police Sergeant on March 4, 1991. (Tr. 59; 184.) Between March 16, 1991, and November 1, 1991, the four officers who were higher on the list than Henry were promoted. (Tr. 60-61.) In January 1992, another position for Sergeant came open because of the retirement of a sergeant. (Tr. 60.)

Henry's Adultery Becomes A Public Problem

Chief Pilant first heard rumors about an affair between Officer Henry, and Kelly Olson Pollard, the wife of Sherman Police Officer Pollard, in the late summer or early fall of 1991. Kelly was a dispatcher for the Sherman Police Department. (Tr. 68-69.) The Chief discussed the rumors with Patrol Captain Caylor, who assured him "that he didn't think there was anything to it; so at that point in time I let it drop." (Tr. 70, L. 552-565.)

Sometime between October 1991 and January 1992, the affair between Officer Henry and Officer Pollard's wife began to cause dissension and problems in the Department. Henry himself complained to the Police Department Internal Affairs officer about posters which had been placed on the Police Department bulletin board. (Tr. 82-83; 190, copy attached as Appendix A.) The posters stated:

> "If you can't trust another officer with your wife, how can you trust him with your life?"

Officer Henry also made a written complaint to Lt. McConnell, Acting Patrol Division Commander, about the posters. Henry wrote:

> "Considering the current rumors and allegations permeating throughout the Sherman Police Department I feel these posters are specifically directed at me." (Tr. 84; 191.)

Chief Pilant asked the Internal Affairs officer, Lt. Mayo, to look into the rumors about Henry having an affair with Officer Pollard's wife. Lt. Mayo submitted a memorandum from Pollard (Tr. 186-187) and a copy of a letter from Henry to Pollard's wife (Tr. 188-189). (Tr. 72-74.)

In the memorandum from Pollard to Lt. Mayo (Tr. 186-187), Pollard described the rumors he had heard that his wife was having an affair with Henry. He reported finding them together at a friend's house in Sherman. He saw Henry running from the house and chased him. He then returned to the house and found his wife wearing a T-shirt and panties. On another occasion, Pollard found his wife and Henry parked at the side of a road about one-half mile from Pollard's house. Pollard found some letters and cards, one of which is marked as Exhibit 5 (Tr. 188-189), which is a love letter from Henry to Pollard's wife. Pollard's memorandum closes by stating that his wife admitted that she had been having an affair with Henry for about eight months.

The Chief Decides Not To Promote Henry

On February 14, 1992, Chief Pilant met with Henry, informed him of his decision not to promote him, and provided him with written notice of his decision. (Tr. 65-67; 182-183.) (Copy attached as Appendix B.)

When the Chief informed Henry of his decision to pass Henry over for promotion, and gave him a copy of the written notice, he discussed his reasons for the decision. He told Henry that he understood that Henry had been having an affair with the wife of another police officer who worked in the same division as Henry. Henry responded that he did not think it was fair that he be passed over, and the Chief pointed out to him that although this was the second time he had discussed this affair with him, Henry had never denied having the affair. (Tr. 68-70.)

Chief Pilant's reasons for passing over Henry are set out in the notice. The primary basis for feeling Henry would not have the respect of fellow officers and that his promotion would be bad for morale and efficiency, was the affair between Henry and Pollard's wife. (Tr. 79-80; 182.)

The Civil Service Hearing

Adultery Is Stipulated

Counsel for Henry, and counsel for the City, stipulated to the following facts at the Civil Service hearing:

A. Sgt. Tom Pollard and Kelly Olson were married on September 30, 1989.

B. This was not made known to the public generally, or to the police department personnel, until July of 1991.

C. A sexual liaison commenced between Henry and Kelly Olson some two to two and a half months prior to that time. After the

revelation of their marriage, the affair did continue. (Tr. 77-78.)

These stipulations were supported by Henry's testimony. He knew Kelly Olson was living with Sgt. Pollard when the affair began, and he continued the affair even after he found out that Kelly Olson was married to Sgt. Pollard.[1] (Tr. 151-158; 255-256.)

The Affair Was Disruptive

As previously discussed, Pollard was upset over the affair. Pollard heard rumors about the affair, which his wife denied. He found Henry's car and his wife's car parked at the home of a friend at 11:00 p.m. When he approached the cars, he saw Henry running away. Pollard was "shocked and hurt." He found his wife at the house in "nothing but a T-shirt and panties." (Tr. 186-187.)

Henry himself complained in writing about harassing posters in numerous locations and on at least two different occasions. (Tr. 191; see also Tr. 34.)

In addition, Henry's sergeant, J. B. Blankenship, testified before the Civil Service Commission. Sgt. Blankenship had worked for the Police Department for nine years and had worked with Henry since Henry's hiring date.

Henry started on Sgt. Blankenship's shift after Blankenship became sergeant. (Tr. 124-125.) Sgt. Blankenship testified that he was aware that there had been

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[1] Kelly divorced Pollard on February 25, 1992, after the Chief notified Henry that he would be passed over.

an affair between Henry and Pollard's wife, Kelly Olson. (Tr. 125-126.) He testified that it had an adverse effect on the shift. The officers on the shift were taking time to discuss it on duty, to argue among themselves as to the rightness and wrongness of it, and to discuss the various opinions of different factions of the shift as to friendships with Henry versus the rightness and wrongness of the relationship between him and Kelly Olson. (Tr. 126.) Sgt. Blankenship stated that if Henry were promoted to sergeant, his affair with the wife of another officer would have an adverse effect on Henry's ability to conduct a shift as a police sergeant. (Tr. 126.)

Capt. Jerry Caylor, of the Sherman Police Department, also testified before the Civil Service Commission. (Tr. 164.) Capt. Caylor stated that the situation affected the morale of the two officers and the dispatcher (Kelly Olson), although he couldn't say as to other members of the Police Department. (Tr. 167.) However, Capt. Caylor admitted that if he found that another officer was having an affair with his wife, it would affect his efficiency and morale, and that he would probably not like to work with the officer. (Tr. 167-168.)

Chief Pilant stated that even if these sexual liaisons never occurred while Henry was on duty, they would be a valid reason for not promoting an officer to sergeant. Chief Pilant testified as follows:

> "A police officer, by the very nature of his work, often times must put his complete faith and trust in fellow officers, to some points even as much as trust him with his life. If a police officer, in my opinion, cannot be trusted to take care of and if you will protect

> a fellow police officer's family, thereby undercutting the faith that a police officer has in his wife and family, then a police officer, in my opinion, you would have serious doubts about whether that police officer can be trusted with your own life. It also hinders the harmony of police officers, between each other." (Tr. 80.)

The Chief testified that in his opinion, a sexual affair between an officer and the wife of an officer in the same department was more likely to cause dissension and problems within a police department than sexual affairs with third parties, not related in any way to the police department and not married to a department officer.[2] (Tr. 80.)

Expert Testimony Supports Decision Not To Promote

Dwayne Gordon Barber, an instructor in criminal justice at Grayson County Junior College, also testified. (Tr. 137.) Mr. Barber had served as Chief of Police in Rowlett, as training coordinator with the City of Plano Police Department, and as an officer with the San Antonio

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[2] Henry testified in deposition that he knew of no other employee in the Sherman Police Department who had been promoted since Chief Pilant became Chief, who had engaged in a sexual affair with a spouse of any employee of the Sherman Police Department. (Tr. 256, L. 14-25; 257, L. 1-8.) Henry admits that he had not even heard rumors about a sexual liaison between another officer of the Sherman Police Department with a spouse of another Sherman police officer since Chief Pilant became Chief. (Tr. 257, L. 9-14.)

Police Department. He had an associate degree from San Antonio College, a bachelor's degree and a master's degree from Southwest Texas State University in San Marcos. (Tr. 138-139.)

In response to a question from the Chairman of the Civil Service Commission, Mr. Barber testified that a police officer's dating or going out with a fellow police officer's wife, or having an extramarital affair, could create concern among the other officers about the trustworthiness of the officer having the extramarital affair. (Tr. 141-142.) He also testified that it could be dangerous to the well-being of the Department and to the lives of the police officers involved. Mr. Barber stated that they could have confidence problems, particularly if this person were rewarded by becoming a supervisor. (Tr. 141-142.)

Commission Upholds Chief

After hearing all of the evidence, the Commission retired to consider its decision. (Tr. 179.) Upon returning to open session, the Commission voted unanimously to uphold the Chief's decision not to promote Henry, and returned Henry's name to the eligibility list. (Tr. 179-180.) A written decision was issued. (Tr. 232, attached as Appendix C.)

SUMMARY OF ARGUMENT

Petitioner seeks an unparalleled expansion of privacy rights, based upon faulty analysis of case law and upon an erroneous re-interpretation of the facts in the record. Neither the U. S. Supreme Court nor the Texas Supreme Court has ever extended, or even hinted they might extend, the "zone of privacy" to adultery by a police officer with a

police dispatcher in the same department who was the wife of another officer in the same department. Privacy refers to activities which are kept private, not those which intrude on the legal relationship of a married couple or which disrupt the relationship of co-workers.

Since privacy rights are not implicated, constitutional analysis does not apply. Alternatively, assume that adultery with co-workers over the objection of their spouses who are also coworkers, somehow involves protected "private" activity. The decision to temporarily delay Henry's promotion and to return him to the eligibility list is rationally related to the City's compelling interest in maintaining discipline and morale in the police department, and was the least intrusive way of doing so.

REASONS FOR DENYING THE WRIT

Federal Privacy Rights Do Not Include Adultery

Henry did not contest any of the evidence presented by the City in its Motion for Summary Judgment. Henry makes no attempt to attack or defeat the City's decision on the grounds that substantial evidence did not support the Chief's decision to pass him over for promotion. The sole basis for Henry's argument is the claim that adultery is a constitutionally protected right so long as it does not occur "on company time."

Because adultery is no longer a crime under state law does not mean that it is always *per se* a constitutionally protected activity. If it were, a court could not consider adultery in granting a divorce or in dividing community assets between the parties. See Texas Family Code §3.03,

§3.63, and cases such as *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980).

This Court has recognized that certain activities are within a "zone of privacy" which is protected from government intrusion. *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973). However, this Court has also stated "our Constitution establishes a broad range of conditions on the exercise of power by the states, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 68, 37 L.Ed.2d 446, 463, 93 S.Ct. 2628 (1973).[3]

Federal Courts which have squarely faced the issue presented in this case have held that adultery is not protected by the Constitution. *Suddarth v. Slane*, 539 F.Supp. 612 (W.D. Va., 1982). See also *Bowers v. Hardwick*, 478 U.S. 186, 191 & 196, 92 L.Ed.2 140, 146 & 149, 106 S.Ct. 2841 (1986), which holds that consensual sodomy in the home is not constitutionally protected. Even the dissenters in *Bowers* recognized a distinction between private consensual conduct and adultery. 478 U.S. at 209, n.4.

Henry's Petition relies heavily upon, and quotes from the opinion of the Dallas Court of Appeals below. However, the cases relied upon by Henry, and cited by the Court of Appeals, broadly discuss the concept of privacy rights, and rights of association under the First Amendment.

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[3] Similarly, not all speech by public employees is protected. *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983).

None of these cases state that it is unconstitutional or even unreasonable for a chief of police to decide that the morale and operating efficiency of a police department would be diminished if the chief **promoted** an officer who was sleeping with another officer's wife, who was also a department employee. None of the cases upholding privacy rights over police department concerns, deal with the issue of disruption of the relationship between Officer Pollard and his wife, and between Henry and Officer Pollard. None deal with promoting the adulterous officer in this age of sexual harassment suits.

Henry's argument that a police officer has a constitutional right to commit adultery with the spouse of other officers stretches the penumbra of privacy rights to the breaking point. How can conduct be private when it deliberately intrudes upon a legal, to say nothing of a moral and psychological, relationship of another couple?

Promotion Delay Rationally Related
to City's Compelling Interests

Even assuming Henry's adultery implicated some limited privacy interests, those interests do not control over all others. Some regulation of fundamental rights may be justified by a compelling state interest. *Roe,* 410 U.S. at 155.

A police department is a paramilitary organization. Subordinate officers must obey their superiors even (and perhaps especially) in times of stress and great physical danger. Police officers are armed and expected to respond to situations involving paramilitary tactics, use of force, and obedience to orders which could place an officer at risk. Maintenance of discipline and morale in a police

department is an important governmental interest. See *Kelley v. Johnson*, 425 U.S. 238, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1978).

In reviewing the rules governing a police department, "the propriety of a particular disciplinary procedure to maintain discipline and good order is a matter of internal administration with which the courts should not interfere in the absence of clear abuse of authority." *Firemen's and Policemen's Civil Service Commission v. Brinkmeyer*, 662 S.W.2d 953 (Tex. 1984).

There was evidence that the affair was causing turmoil in the department. At the very least, the relationship between three co-workers, Henry, Mr. Pollard, and Mrs. Pollard, was disrupted. Henry himself was upset enough about the posters to complain. How much disruption of a police department must be tolerated to protect an officer's "right" to enjoy the sexual favors of co-workers who are married to fellow officers in the same department?

In balancing the City's interest against Henry's assumed "privacy" rights, how much did the City intrude on these rights? The City's decision does not involve termination of an employee, but rather a temporary postponement of his promotion. (Tr. 232.)

Many cases have recognized an employee's constitutionally protected property interest in continued employment. However, the employee's interest in a specific promotion on a specific date is far more tenuous. Termination of a civil service employee under Texas law must be based upon specific statutory grounds (Tex. Loc. Gov. Code §143.051) and involves specific procedures and

standards of review. On the other hand, a decision not to promote a person at the top of the list only requires "a valid reason." Tex. Loc. Gov. Code §143.036(f).

The Chief testified that he chose a less harsh course of action which would still avoid detriment to the department. (Tr. 84, L. 877-880; 85, L. 881-882.) Henry was not fired. He was passed over for promotion on one specific occasion and returned to the eligibility list. What less intrusive means can be imagined? Had Henry been promoted (even with a reprimand) while carrying on his adulterous affair, how could that have been seen as anything but approval for: 1) his on-going callous treatment of a fellow officer; and 2) his sexual relations with a dispatcher who would now be his subordinate?

CONCLUSION

Henry is not a member of a protected class. He brings no claim of discrimination based on a suspect classification. The rights of conscience in matters of religion are not implicated in Henry's affair with a co-worker. Henry was not compelled to give evidence against himself. He chose to indulge in the affair, and then voluntarily complained to the Chief when other officers reacted unfavorably. Similarly, there was no arbitrary deprivation of life or liberty. After a full due process hearing, Henry's promotion was temporarily delayed, as permitted by statute.

It was not the sanctity of **Henry's** home or person which was invaded by his affair with police dispatcher Kelly Olson Pollard, the wife of police officer Tom Pollard. Rather, he invaded a legal relationship between married co-workers.

In this case, the Court must review the decision of an administrative agency (the Civil Service Commission) under the substantial evidence rule. The facts were uncontested and Henry never attempted to claim that the decision was unsupported by substantial evidence. Henry's case rests squarely and completely on the proposition that on-going adultery with the wife of a fellow officer is a constitutionally protected activity so that it cannot be the basis for delay in promotion.

Neither the federal nor the state Constitutions mention adultery. The "penumbra of privacy" does not extend to protect mere self-indulgent conduct with the spouses of co-workers. If such conduct is not protected by a right of privacy, then the substantial evidence rule controls and the City prevails.

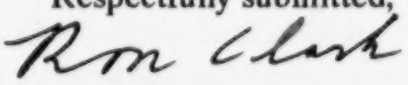
Alternatively, even accepting the far-fetched notion that Henry's adultery was "private" for constitutional purposes, the Court should balance this private right with the compelling interest of the police department in maintaining discipline and morale.

The Chief and the Civil Service Commission were considering Henry's promotion to a supervisory position in a para-military organization. A sergeant is responsible not only for his own conduct, but is also responsible for leading, inspiring, and controlling other officers on a routine basis and in times of great danger. It is clear that Henry lacked the common sense to refrain from sex with the wife of a man who carries a pistol for a living. Henry lacked the self control and discipline to refrain from sex with the wife of a fellow officer upon whom his life may depend. Such character flaws are bad enough in a patrol officer. They have long been recognized as a recipe for disaster in a

supervisor. (See the story of David and Bath-Sheba, II Samuel, Ch. 11.) Temporarily delaying Henry's promotion until his self control improved was rationally related to the Department's interest in discipline and morale and was the least intrusive way of handling the problem.

For these reasons, the writ of certiorari should be denied.

Respectfully submitted,



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APPENDIX A - Poster

IF YOU CAN'T TRUST

ANOTHER OFFICER WITH YOUR

WIFE,

HOW CAN YOU TRUST HIM WITH

YOUR LIFE?

DEFENDANT'S
EXHIBIT
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7/20/92 DT

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APPENDIX B - Passover Notice

memorandum

DATE: 14 February 1992

TO: George Olsen
Director of Civil Service

FROM: Stephen C. Pilant
Chief of Police

SUBJ: Sergeant's Promotional Passover

Pursuant to Chapter 143, Section 143.036, Texas Government Code, *"Procedure For Making Promotional Appointments"*, I hereby wish to inform you of my decision to pass-over Ptlm. Otis Henry, for the rank of Sergeant. Ptlm. Henry is currently placed Number 1 on the Eligibility List for the rank of Sergeant.

The reason for the pass-over is that I do not feel that the patrol officers who he would supervise, nor other members of the Department with who he had to work, would have the necessary respect and trust in him that is vital to effective management. Furthermore, the selection of Ptlm. Henry would adversely impact the efficiency and morale of the Department.

Ptlm. Henry and I discussed this decision this morning at 8:00 A.M., and I delivered to him a copy of Chapter 143.010, *"Commission Appeal Procedure"*, which explains procedures for requesting a review of this decision.

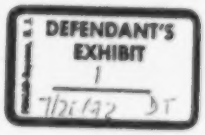

Exhibit 1

APPENDIX C - Civil Service Commission Order

IN RE: SECTION 143.036 HEARING OF PATROLMAN OTIS HENRY BEFORE THE FIREMEN'S AND POLICE OFFICERS' CIVIL SERVICE COMMISSION OF THE CITY OF SHERMAN, TEXAS

ORDER

On this the 17th day of April, 1992, came on to be heard the appeal of Patrolman Otis Henry, Sherman Police Department, complaining of Police Chief Stephen C. Pilant's action of passing over Patrolman Henry to the position of Sergeant.

The Commission, after hearing the testimony of numerous witnesses and considering documentary evidence submitted by the parties, finds that Chief Pilant had a valid reason for not promoting Patrolman Henry to the position of Sergeant.

IT IS, THEREFORE, ORDERED that Patrolman Otis Henry not be promoted to the rank of Sergeant, but returned to the eligibility list and resubmitted to the department head if a vacancy occurs.

SIGNED AND ENTERED this the 20th day of April, 1992.

R.B. Jerry McGowen

CHAIRMAN R. B. JERRY MCGOWEN
FIREMEN'S AND POLICE OFFICERS' CIVIL SERVICE COMMISSION OF THE CITY OF SHERMAN, TEXAS

Bruce E. Melton

COMMISSIONER BRUCE MELTON

L. Collinsworth

COMMISSIONER LEONARD COLLINSWORTH

D.P. 1-1

DEFENDANT'S EXHIBIT C